

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

PLASTIC PIPE AND FITTINGS ASSOCIATION,

Plaintiff and Respondent,

B166499

v.

**CALIFORNIA BUILDING STANDARDS
COMMISSION, et al.,**

Defendants and Appellants.

Los Angeles County Superior Court No. BS076413
The Honorable Dzintra Janavs, Judge

APPELLANTS' OPENING BRIEF

BILL LOCKYER
Attorney General of the State of California

ANDREA LYNN HOCH
Chief Assistant Attorney General

LOUIS R. MAURO
Senior Assistant Attorney General

GARY TAVETIAN
Deputy Attorney General

CHRISTINE SPROUL,
Deputy Attorney General

RAMON M. DE LA GUARDIA
Deputy Attorney General, SBN 56866
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5467
Fax: (916) 323-2137

Attorneys for Defendants and Appellants
Building Standards Commission
Department of General Services
Office of Statewide Health Planning &
Development
Department of Health Services
Department of Housing and Community
Development
Department of Food and Agriculture

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APPELLANTS' RULE 14 STATEMENT

This appeal is from a final judgment that disposed of all the issues between the parties. Judgment was entered on February 13, 2003.

STATEMENT OF THE CASE

On May 31, 2002, Appellant Plastic Pipe and Fittings Association ("PPFA") filed a petition for writ of mandate in the Los Angeles Superior Court. PPFA sought an order directing the Appellants, the state agencies and Commission responsible for proposing, adopting and approving building standards in California, to set aside their decision to defer approval of cross-linked polyethylene ("PEX") pipes in the 2002 edition of the California Plumbing Code ("CPC").

After briefing by all parties (1JA 165-184; 1JA 282-302; 3JA 616-632), the matter was heard and argued on December 19, 2002. Respondent also filed requests for judicial notice and a motion to supplement the rulemaking file. (1JA 185-223, 238-242; 1JA 271-281; 2JS 303-315.) At the conclusion of the arguments, the court ruled it would grant the writ of mandate. (RT A-16,

18, 63.)^{1/} PPFA filed a proposed judgment and writ of mandate. On January 13, 2003, Appellants filed objections to the proposed judgment and writ of mandate. On February 13, 2003, after hearing arguments on the proposed judgment and writ of mandate, the superior court overruled the State's objections and issued a judgment and writ which directed the Appellants to set aside their previous orders and to include PEX in the CPC. (RT B-14; 3JA 787-799.)

Appellants' timely notice of appeal was filed on April 10, 2003. (3JA 800-802.)

STATEMENT OF THE FACTS

A. The State Parties And Their Responsibility For Building Standards.

In California, the formulation of building standards is a multi-agency task presided over by Appellant California Building Standards Commission ("the Commission"), which must adopt and approve all proposed building standards. (Health and Saf. Code, §§ 18906, 18907.)^{2/} The Commission is also responsible for proposing building standards for most state buildings. (§ 18934.5.)

Other state agencies are involved in proposing building standards within their particular areas of expertise. Appellant Department of Housing and Community Development ("HCD") is responsible for proposing building standards for all dwellings, apartment houses, hotels, motels, and lodging houses. (§ 17921.) Appellant Division of the State Architect-Structural Safety ("DSA") proposes building standards for state essential-services buildings and

1. "RT" refers to the Reporter's transcript.

2. Unless otherwise noted, all section references are to the Health and Safety Code.

for public elementary and secondary schools and community colleges. (§ 16022; Educ. Code, § 81142.) Appellant Office of Statewide Health Planning and Development (“OSHPD”) proposes building standards for hospitals, skilled nursing facilities, clinics and correctional treatment centers. (§§ 1275, 1226, 129850.) Appellant Department of Health Services (“DHS”) proposes standards for public swimming pools and retail food facilities. (§§ 11370, 116050.) And Appellant Department of Food and Agriculture (“DFA”) is responsible for proposing standards for dairies and meat inspection facilities. (Food and Agr. Code, §§ 18735, 19384, 33481 and 33731.)

An agency proposing to adopt a building standard must submit it to the Commission for review and approval in accordance with the criteria set forth in Section 18930.^{3/} The Commission may approve the proposed standard, return it to the agency with recommendations for amendment, or reject it. (§ 18931.)

B. PEX And The Adoption Of The 2001 California Plumbing Code.

Every three years, Appellants are required to revise and adopt building codes as state regulations in accordance with the California Administrative Procedure Act (Gov. Code, § 11340 et seq.). For the 2001 Edition of the Building Codes, the Appellants used the 2000 Uniform Plumbing Code (“UPC”) as the basis for the California Plumbing Code (“CPC”). The UPC is a model code published by the International Association of Plumbing and Mechanical Officials (“IAPMO”).

In the 2000 Edition of the UPC, IAPMO included cross-linked polyethylene (“PEX”), a form of plastic piping, as an approved building

3. These criteria are also referred to as the “9 point criteria.”

material. (R 5904.)^{4/} No prior edition of the UPC had ever authorized the use of any type of PEX piping. And no California state agency had ever considered or approved the use of PEX in the CPC. (R 5904.)

In preparation for adopting the 2001 Edition of the CPC, the State held two 45-day public comment periods and one 15-day public comment period to obtain the views of the public on whether PEX should be included in the CPC. (R 204.)^{5/} On July 23, 2001, Appellants received, as a public comment, a report from chemist Thomas Reid. This report examined the potential impacts of PEX and expressed the opinion that PEX could have direct and indirect impacts on the environment and on the health and safety of the California public. (R 622-630.) Mr. Reid was concerned that: (1) PEX was susceptible to premature mechanical failure because of its chemical structure; (2) there was a potential for dangerous chemicals to leak from the PEX pipes into the drinking water and soil; (3) outside contaminants such as benzene, gasoline and pesticides could permeate PEX pipes and contaminate drinking water; and (4) PEX may pose a significant fire hazard. (R 622-630.)

In light of the public comments, the State agencies *unanimously*^{6/} agreed that they did not have sufficient information to make a fully informed decision to include PEX in the CPC and that the public interest required further

4. “R” refers to the rulemaking file which Appellants are lodging with the court. Appellants filed excerpts from the rulemaking file which are in the Joint Appendix. (2JA 316-595.)

5. The first 45-day comment period started on July 6, 2001, and ended on August 20, 2001; the second 45-day public comment period started on October 17, 2001, and ended on November 30, 2001. Commission staff conducted a public hearing on November 15, 2001, and the last public comment period commenced on December 3, 2001 and ended on December 17, 2001. (R 204.)

6. Appellant OSHPD’s decision was also based on its own review of the appropriateness of PEX for health facilities. (R 2600.)

review of PEX before approval. (R 204-221; 306-323; 378-395; 2021-2075; 2592-2608; 2735-2738.)

On May 2, 2002, the proposed new CPC came before the Commission for adoption as state regulations. A number of consumer, environmental and building contractor associations appeared and testified for and against the approval of PEX. Those opposed to PEX wanted the potential risks associated with the material fully evaluated through the California Environmental Quality Act (“CEQA”) review process. (R 5862-65, 5901.)

After reviewing the record, hearing the testimony of proponents and opponents of PEX, and receiving additional written comments, the Commission voted to accept the recommendations of the proposing agencies to defer the approval of PEX in the 2001 CPC pending further study. The Commission exercised its discretion and ordered an initial environmental study of PEX. (R 5941-5985.)

STANDARD OF REVIEW

State agency rulemaking actions involve the exercise of discretion. A discretionary act is one in which the agency is given power to act according to the dictates of its own judgment. (*Rodriguez v. Solis* (1991) Cal.App.4th 495, 501-502.) Rulemaking decisions are subject to the following standard of review: the Court’s review is limited to the administrative record and the Court may not substitute its judgment for that of the agency. (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal. 4th 559, 565 [“*Western States*”].) Whether the agency’s decision is supported by substantial evidence is a question of law, and the Court’s “task is not to weigh conflicting evidence and determine who has the better argument.” (*Western States, supra*, at 573- 574.) If reasonable minds disagree, the action must be upheld. (*Helena*

F. v. West Contra Costa Unified School District (1996) 49 Cal.App.4th 1793, 1799.)

Judicial review of an agency's quasi-legislative action is through ordinary mandamus under Code of Civil Procedure section 1085. In considering an agency decision to adopt regulations, the trial court is limited to an inquiry into whether the agency's action was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy, or unlawful or procedurally unfair. These are essentially questions of law. (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1304-1305.) In reviewing questions of law, the appellate court makes its own determinations; it is not bound by the conclusions of the trial court. (*Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700.)

Mandate will lie to correct an abuse of discretion, but only when the agency action "is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." (*Shapell Industries, Inc. Governing Board* (1991) 1 Cal.App.4th 218, 230, 233-234 ["*Shapell Industries*"].)

ARGUMENT

I.

THE DECISION TO DEFER APPROVAL OF PEX WAS A VALID EXERCISE OF DISCRETION

The court held the exclusion of PEX was arbitrary because IAPMO had already tested and included PEX in the model code, other states had approved PEX, and local governments in California had approved PEX as an alternate material. (RT A-32.) The trial court's ruling that Appellants acted arbitrarily, however, was erroneous and was not consistent with California law.

A. Although PEX Had Been Approved in Other Jurisdictions, Appellants' Exercise of Discretion in Seeking Further Review Was Not Arbitrary.

While published model codes are certainly considered in preparing building standards, those model codes only serve as guidance for such standards. (§ 18930, subd. (a)(7)^{2/} [model codes should be incorporated “where appropriate”].) The building standards law encourages agencies to adopt a code format that is, *to the extent appropriate and within the public interest, consistent*

7. Section 18930 provides in pertinent part:

(a) Any building standard adopted or proposed by state agencies shall be submitted to, and approved or adopted by, the California Building Standards Commission prior to codification. Prior to submission to the commission, building standards shall be adopted in compliance with the [Administrative Procedure Act] Building standards adopted by state agencies and submitted to the Commission for approval shall be accompanied by an analysis . . . which shall, to the satisfaction of the commission, justify the approval thereof in terms of the following criteria: . . .

(3) The public interest requires the adoption of the building standards.

(4) The proposed building standard is not unreasonable, arbitrary, unfair, or capricious, in whole or in part.

(5) The cost to the public is reasonable, based on the overall benefit to be derived from the building standards

(7) The applicable national specifications, published standards, and model codes have been incorporated therein as provided in this part, where appropriate.

(A) If a national specification, published standard, or model code does not adequately address the goals of the state agency, a statement defining the inadequacy shall accompany the proposed building standard when submitted to the commission

(d) (1) The commission shall give great weight to the determinations and analysis of the adopting agency or state agency that proposes the building standards on each of the criteria for approval set forth in subdivision (a). Any factual determinations of the adopting agency or state agency that proposes the building standards shall be considered conclusive by the commission unless the commission specifically finds, and sets forth its reasoning in writing, that the factual determination is arbitrary and capricious or substantially unsupported by the evidence considered by the adopting agency or state agency that proposes the building standards. (Emphasis added.)

with applicable model codes. (§§ 18930, subds. (a)(3) & (a)(7), 18931, subds. (c) & (d), 18932, subd. (c).) However, the law does not require agencies to adopt any particular model code or model code provision. (See *International Assn. of Plumbing and Mechanical Officials v. California Building Stds. Com.* (1997) 55 Cal.App.4th 245, 256 [“*IAPMO v. CBSC*”].)

The Legislature has not delegated rulemaking responsibilities to the private model code organizations. Instead, the Legislature has fashioned a procedure that walks “a tight line between lawful and unlawful delegation of regulatory authority.” (*IAPMO v. CBSC*, *supra*, 55 Cal.App.4th at 253.) As discussed extensively in *IAPMO v. CBSC*, “the Legislature could not lawfully grant the power to make laws to a private entity such as IAPMO.” (*Ibid.*)

Thus, the law requires Appellants to independently evaluate each model code provision and, as they deem appropriate and necessary, modify or reject those provisions that are not in the public interest or are not appropriate for California. (See § 18930, subd. (a)(3) [agency must determine if codes proposed for adoption are in “the public interest”]; § 18930, subd. (a)(4) [agency must determine if codes proposed for adoption are fair and reasonable]; § 18930 subd. (a)(7) [agency must determine if codes proposed for adoption are “appropriate”]; see also §§ 18931, subds. (c) & (d), 18932, subd. (c).)

It was not unprecedented for California to exclude a building material that was included in the model code. In the 1980's California modified the UPC provisions for the use of acrylonitrile-butadiene-styrene (ABS), another type of plastic pipe, and restricted its use to two-story buildings. In 1991, the UPC “backed off” its earlier stance on ABS and, consistent with the CPC, restricted the use of ABS. (*ABS Institute v. City of Lancaster* (1994) 24 Cal.App. 4th 285, fn. 4 at 289.)^{8/}

8. Mr. Reid offered expert opinion in the *ABS Institute* case and his opinion is discussed in the decision of the Court of Appeal.

B. It Was Not An Abuse of Discretion For Appellants to Determine That The Public Interest Required Further Review Of PEX.

In the case of PEX, Appellants concluded the public interest required that PEX should not be approved as a building material in California pending review of the issues raised about its safety and possible impact on the environment.^{9/} Rather than being arbitrary, Appellants' findings were based on the questions raised in public comments, coupled with their inability to review the issues raised during the public comment period and the need to update the CPC.

As noted above, Mr. Reid warned that PEX could fail mechanically, that contaminants could permeate the PEX pipes and that the ingredients used to manufacture PEX could leach into the soil and ground water. He concluded that the PEX manufacturers had not released the necessary information for California to make an informed decision regarding PEX. (R 100, 104, 596, 622.) OSHPD's analysis of PEX called for more review of PEX because the manufacturers had provided only "benchmark" data on the product and had not provided information on all of its ingredients. (R 2600; 625-626.)

The decision that PEX required further review was consistent with Appellants' statutory responsibility to demonstrate to the satisfaction of the

9. PPFA claimed that HCD's own analysis refutes the pipe trades' arguments (JA 175). This claim is based on a selective reading of the record and an inappropriate invitation for the court to reweigh the evidence. HCD simply explained what was known about PEX and its current uses. But in balancing PEX's potential benefits against the potential risks of including PEX in the CPC, HCD recommended deferred approval of PEX because "history has shown that caution is appropriate." (R 2028.) HCD added that "the general questions of safety and performance that were raised warrant additional review prior to the approval of PEX in California." (R 2036.)

Commission that any new product approved in the CPC would be appropriate for the many types of construction where it would be used.^{10/} (R 2600.)

C. The Fact That Local Jurisdictions May Have Allowed PEX As An Alternate Building Material Did Not Negate Appellants’ Discretion or Obligation to Review PEX for Statewide Approval.

The superior court found the exclusion of PEX was arbitrary because local California jurisdictions were allowing PEX to be used as an alternate material. (RT A-20.) But the trial court apparently failed to appreciate the distinction between “alternate” and “approved” building materials. Local building officials review alternate building materials, including PEX, on a project by project basis. (R 2432, note 1; 84 Ops.Cal.Atty.Gen. 209, 213 (2001); 64 Ops.Cal.Atty.Gen. 536, 540 (1981).) However, such isolated alternate approval on particular projects does not mean that PEX is “approved” as a statewide building material, that it is widely used in California or that it can be used without a review of its appropriateness for a particular project. Ultimately, Appellants retained discretion to determine whether approval of PEX on a statewide basis was in the best interests of the State of California.

D. Appellants’ Discretionary Decision Was Supported By The Statutory Criteria For Analyzing Proposed Building Standards.

Appellants’ decision that the public interest required further

10. PPFA’s own installation guide states PEX should not be exposed to sunlight, used in contaminated soils, used for swimming pool pipes or with common building compounds. Additionally, building standards for hospitals require compartmentalization for fire protection, including the use of fire resistant barriers. When these barriers are penetrated by pipes and conduits, fireproof sealing compounds are required. However, PPFA’s own installation manual states that PEX should not come in contact with pipe sealing materials and firewall sealing compounds. (3JA 706, 712.)

review of PEX is also supported by the rulemaking file. Appellants' decision was consistent with their responsibilities and duties to protect the public interest and to consider the potential impact of their decision on the environment.

Section 18930 requires agencies to analyze building standards in terms of nine statutory criteria. (See footnote 7, *supra*.) While the agency analysis must be "to the satisfaction" of the Commission, the Commission must "give great weight to the determinations and analysis of the adopting agency on each of the criteria for approval." And the factual determinations of the agencies are deemed conclusive unless the Commission finds they were arbitrary or without evidentiary authority. (§ 18930, subd. (d)(1).) The determination that PEX required more review was a factual determination. Accordingly, the Commission was constrained to adopt the agencies' recommendation that PEX should be excluded pending further study unless it found the recommendation arbitrary and without factual basis. Weighing the evidence and the agency recommendations, the Commission properly exercised its discretion and voted to exclude PEX pending further review.^{11/}

11. Because the adoption of building standard regulations is a quasi-legislative act, not a quasi-judicial act, Appellants were only required to make the Section 18930 findings. (Cf. *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 473.) And no additional finding or evidentiary support was necessary for judicial review of the Commission's decision. (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 788.)

E. There Were No Procedural Irregularities.

Using statements taken out of context from an HCD e-mail, PPFA mischaracterized the review process as “secret.” (1JA 179.) Ironically, the e-mail PPFA cites discusses the fact that the PEX issue would be put out for public comment (R 1304), which occurred within days. (R 2076-2078.) The public had a full opportunity to participate in the decision-making process. Similarly, PPFA mischaracterized e-mail from the Pipe Trades’ counsel to HCD^{12/} as indicating that the Pipe Trades would receive a copy of the public notice before it was sent. (1JA 179.) In fact, HCD refused counsel’s request, stating that the Pipe Trades would receive a copy when it was sent to the Commission (and made publicly available). (R 1778.)

PPFA also contended, with no analysis or argument beyond the bare assertion of irregularity, that the PEX decision was tainted by the appointment of two new Commission members two days before the meeting. It does not amount to a procedural irregularity for the Governor to perform the functions of his office by filling vacancies, nor did this change the overall Commission vote. (See, e.g. R 5959-5960 [a unanimous 6-0 vote].)

PPFA further alleged that Commissioner Barry Broad had drafted a motion prior to the hearing and had shared it with Mr. Cardozo, who had objected to the approval of PEX. There is no factual basis for such an allegation, but even if there were, there is no prohibition against a commission member preparing pre-meeting drafts or resolutions. Indeed, the Legislature routinely prepares proposed bills and resolutions. And as a member of a public entity, Commissioner Barry Broad is free to have individual contacts and conversations with any member of the public. (Gov. Code, § 11122.5, subd. (c)(1).)

In addition, PPFA contended that the proposing agencies

12. See page 1778 of the rulemaking file.

improperly acted in unison, including the Commission which wrote the Final Statement of Reasons for the Department of Food and Agriculture and the Department of Health Services. However, all agencies were presented with information asserting that PEX might pose a significant environmental impact. Although the Commission staff performed the final staff work for the Commission and for the Departments of Food and Agriculture and Health Services, this was neither unusual nor irregular.

PPFA also contended the Commission secretly provided for the publication of the 2001 CPC prior to the May 2, 2002 hearing. This argument is without merit. As PPFA acknowledges in its pleadings, the adoption of the 2001 CPC was late. The CPC would not take effect until 180 days after publication and the Commission had established a November 1, 2002, effective date. (R 5960.) IAPMO proposed draft documents for publication with the understanding that if the Commission's action required modifications of the draft documents, IAPMO had dedicated staff available to make any necessary corrections in time to meet the deadline. (R 5962.)

Finally, PPFA contended that it was irregular for Commission members to comment on who was going to bear the cost of the PEX review. There is no irregularity there. The Commission did not vote or take final action on that issue, which was an appropriate and logical matter for discussion. The discussion did not invalidate the Commission action on May 2, 2002.

II.

THE RECORD SUPPORTS THE COMMISSION DECISION TO ORDER A THRESHOLD ENVIRONMENTAL STUDY

Given the information suggesting that PEX could have an environmental impact, the Commission properly exercised its discretion by seeking an "initial study" of PEX's potential environmental impacts before approving a change in state building standards that would permit the unfettered

use of PEX for all building projects in California. In doing so, the Commission could look to CEQA for guidance.

A. CEQA Provides Guidance Supporting the Commission’s Discretionary Decision.

CEQA’s general purpose is to compel government at all levels to make decisions with environmental consequences in mind. (*River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154, 178.) CEQA declares its general policy objective as follows:

“... it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and . . . [CEQA procedures] are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects”

(Pub. Resources Code, § 21002, emphasis added.)

CEQA is interpreted to afford the fullest possible environmental protection within the reasonable scope of its statutory language. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259; *Laurel Heights Neighborhood Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 390.) It is “too late to argue for a grudging, miserly reading of CEQA.” (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274.)

The CEQA Guidelines^{13/} identify a process for determining if an

13. The CEQA Guidelines are state regulations adopted by the Resources Agency essentially providing a roadmap for CEQA compliance by state and local agencies. They are to be accorded great weight by the courts

environmental review is appropriate. (Cal. Code Regs., tit.14, § 15002, subd. (k).) First, the agency decides whether the proposed action is a “project” or qualifies for an exemption. (Cal. Code Regs., tit.14, §§ 15002, subd. (k)(1); 15060, subd. (c).) Second, if the action is not exempt, the agency prepares an initial study, i.e., a preliminary analysis of potential adverse environmental effects that may result from the proposed project. (Cal. Code Regs., tit.14, § 15002, subd. (k)(2); 15063.) Third, using the initial study and considering the record as a whole, if the agency determines there is no substantial evidence the project may have a significant adverse environmental impact, the agency issues a negative declaration. (Pub. Resources Code, § 21080, subd. (c); Cal. Code Regs., tit.14 § 15002, subd. (k)(2).)

The determination whether a proposed action is a “project” is itself a three stage process: first, the proposed action must be discretionary; second, it must not be exempt; and, third, if it is discretionary and not exempt, an inquiry is made whether it will have a direct or reasonably foreseeable indirect physical change in the environment. (Pub. Resources Code, § 21065.)

Looking to CEQA for guidance, it is clear that Appellants had discretion to approve or disapprove PEX as a building material in California. Included in this discretion was their ability to condition, to limit and otherwise to alter the provisions of building standards and to adopt them as state regulations. (*Friends of Westwood v. City of Los Angeles* (1987) 191 Cal.App. 3d 259, 271-273.) The “touchstone” of discretion is the agency’s ability to

except when a provision is clearly unauthorized or erroneous. (*Laurel Heights, supra*, at 391 fn. 2.)

shape the proposal before adopting it, in response to environmental concerns. (*Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1139.)

In addition, in exercising its discretion and in looking to CEQA for Guidance, the Commission could properly conclude that the issue of PEX as an approved building material did not qualify for an exemption. The Commission could appropriately conclude that an initial study was warranted.

Moreover, information was provided to the Appellants that use of PEX as a building material may adversely affect the environment. There is a low evidentiary threshold for an agency decision to prepare an initial study. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317.) Where there is a reasonable possibility that a proposal may have a significant adverse environmental effect, an initial study is warranted before approval. (*Azusa Land Reclamation v. San Gabriel Main Watermaster* (1997) 52 Cal.App.4th 1165, 1199-1200.)

The possibility of an adverse effect on the environment may arise from “either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Resources Code, § 21065.) The ultimate physical changes in the environment which may culminate from a proposed government rulemaking action are to be considered. (Cal. Code Regs., tit. 14, § 15378; *Fullerton Jt. Unified Sch. Dist v. St. Bd of Education* (1982) 32 Cal.3d 779, 795, citing *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 279, declined to follow on other grounds in *Bd of Sup v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 909.)

Because Appellants had information that the approval of PEX as a building material had the potential to adversely affect the environment, there was a discretionary basis for the Commission to order an initial study. (See *City of Livermore v. LAFCO* (1986) 184 Cal.App.3d 531, 539, 540 [agency was

required to analyze environmental impact of changes in guidelines because changes could affect land use].)

B. There Was Evidence That the Use of PEX Could Have Adverse Environmental Effects.

While there is no dispute that State approval of PEX as a building material would result in its greater use in new construction in California, there was a dispute over whether the use could result in adverse environmental effects. The agency analysis and some public comments asserted that PEX had the potential for adverse environmental impacts. The comments of the proponents of PEX asserted it was a safe building material.

In the face of conflicting assertions, the Commission had the discretion to call for the preparation of an initial study. (See, Cal. Code Regs., tit. 14, §§ 15063 and 15064.) An initial study was the appropriate response to the conflicting environmental claims. (See, Cal. Code Regs., tit. 14, § 15060, subd. (d).) The Commission could not determine the validity of the assertions of PEX's adverse impact on the environment without study and the study had to be undertaken before approval of PEX. (See *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307, 311.)

When there is evidence of a reasonable possibility that a proposed action may result in adverse environmental impacts, it is proper for the agency to look further before concluding that no study is required. (See *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) The case of *Stanislaus Audubon Society Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, illustrates that it is proper to investigate further. In *Stanislaus*, the County prepared an initial study for a major development proposal with a golf course and residences, and noted its potential to cause growth and cumulative adverse environmental impacts, which would trigger the preparation of an EIR. Although a later-prepared, revised initial study did not indicate this same

potential impact, the Court likened this to the situation of attempting to unring a bell. (*Stanislaus, supra*, at 154.) In *Stanislaus*, because a reasonable possibility of a significant adverse effect was raised in the record, the county was required to address it with further study.

C. The Commission Properly Exercised Its Discretion In Determining That An Initial Study Was Appropriate.

The trial court determined that the Commission erroneously called for an initial study. (RT A-24.) The trial court determined that the evidence before the Commission, including Mr. Reid’s report, was an insufficient basis upon which to trigger an initial study of PEX. Yet, CEQA provides guidance that the Commission acted in good faith to call for an initial study of potential impacts.

An initial study is appropriate when there is a “possibility” of an effect on the environment. (*Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist.* (1991) 229 Cal.App.3d 110, 129-130 [“*Security Environmental Systems*”].) And courts have determined that agency decisions to *invoke* environmental review are virtually “unassailable.” (See, *Eller Media v. Community Redevelopment Agency* (2003) 108 Cal.App.4th 25, 44; *Meridian Ocean v. State Lands Comm’n* (1990) 222 Cal.App.3d 153, 170 [decision to require CEQA review is “unassailable”]; *Security Environmental Systems, supra*, 229 Cal.App.3d at 133; *Oro Fino Gold v. County of El Dorado* (1990) 225 Cal.App.3d 872, 882.)

The Commission ordered an initial study on the basis of the public comments, including expert opinion,^{14/} and the analysis and

14. A decision to trigger environmental review may be based on expert opinion, and expert opinion may be used in an initial study. (See *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 831; CEQA Guidelines, § 15063, subd. (a)(3).) Expert opinion can constitute substantial

recommendations of the the proposing agencies. The expert opinion was based on a review of the literature, past experience with plastic pipe failures, the chemistry of PEX and the need to know the ingredients used in the various types of PEX.^{15/} OSHPD recommended a study because PEX had never been used in health facilities where there are high temperatures, high pressure systems and chlorinated exercise pools.

A factor in the trial court's decision was PPFA's argument that the Commission's decision to conduct an environmental study came late in the regulatory process. (RT A-47.) But the Commission acted promptly after receiving public comments, and after the proposing agencies brought the environmental concerns about PEX to the Commission's attention. The Commission had to determine whether this new information warranted an initial study. (*Meridian Ocean Systems, supra*, 222 Cal. App. 3d at 168 .)

Under the circumstances, the Commission properly exercised its discretion in responding to evidence of potential environmental effects. (See *Meridian Ocean Systems, supra*, 222 Cal.App. 3d at 228 [EIR properly ordered by Commission acting in quasi-legislative capacity even though project had previously been exempted and the exemption had not been revoked]; *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 365 New information received after first EIR was certified required supplemental EIR]; *Security Environmental Systems, supra*, 229 Cal.App.3d 110 [renewal of permits for construction of hazardous waste disposal properly

evidence. (Pub. Resources Code, § 21082.2, subd. (c).) The fact that an expert is retained by a particular party is irrelevant. (*Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 908 [EIR not fatally undermined by participation of developer and paid experts in underlying studies and analysis].)

15. Experts are permitted to make a judgment on the basis of existing evidence. (See *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App. 4th 1341, 1362.)

conditioned on EIR, health risks assessment and demonstration that project complied with best available control technology].)

III.

THE WRIT ISSUED IN THIS CASE IMPERMISSIBLY INTRUDES ON THE APPELLANTS' QUASI-LEGISLATIVE POWERS

The trial court's order requires all of the Appellants to amend their findings and rulemaking files to include PEX as an approved building standard without regard to the type of building they regulate. Even if Appellants had arbitrarily excluded PEX, the trial court's order must be reversed because (1) there is no factual basis for ordering that PEX be approved for every varied use in California, and (2) the order impermissibly intrudes on Appellants' discretion and their exercise of quasi-legislative powers.

Factually, there is no evidence in the rulemaking file that PEX has ever been used – or is appropriate for use – in swimming pools, hospitals or health facilities in California. But the trial court's failure to fashion an order that distinguished among the Appellants and the various types of facilities they regulate will result in PEX being approved for these uses.

On an even more basic level, the trial court violated the fundamental rule that mandate does not lie to compel an administrative agency to exercise its discretion in a particular manner. “The propriety or impropriety of a particular legislative decision is a matter for the Legislature and the administrative agencies to which it has lawfully delegated quasi-legislative authority; such matters are not appropriate for the judiciary.” (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572.)

The adoption of regulations – here building standards – is a discretionary quasi-legislative act entrusted by statute to Appellants. With all due respect, the trial court cannot mandate the content of regulations to be adopted by a statewide agency. (*Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616.)

It was improper for the lower court to issue a writ dictating the content of regulations, even after the court ruled that Appellants had not proceeded in the manner required by law. (*City and County of San Francisco v. Superior Court* (1976) 57 Cal.App.3d 44 [superior court's writ ordering the county to adopt welfare payment standards was reversed on appeal because the superior court encroached on quasi-legislative territory; court of appeal ordered remand to county to adopt standards, which could then be reviewed again by the court].) The court limited Appellants' discretion by not remanding the case. (*McBail v. Solano County Local Area Formation Commission* (1998) 62 Cal.App.4th 1223.) Appellants had not exhausted their regulatory discretion. (See *English v. City of Long Beach* (1950) 35 Cal.2d 155, 160 [quasi-judicial mandate case holding that on remand for failure to provide fair hearing, agency is free to reconsider issues because it has not exhausted its discretion until it provides fair hearing].)

On remand, Appellants would have had the discretion to review the appropriateness of PEX as a building material in light of all the available information. (§ 18930; *California Association of Nursing Homes v. Williams* (1970) 4 Cal.App.3d 800; see also *California Cas. Indemn. Exch. v. Industrial Acc. Commission* (1923) 190 Cal. 433, 438 [modification of Supreme Court judgment to permit additional evidence on remand was unnecessary because the effect of Court's decision was to vacate prior Commission decision and to set the matter at large, for proceedings not inconsistent therewith].)

The record contains evidence that PEX is not appropriate for

hospitals and health facilities and that there should be limits on its uses for residences. (3JA 706-712). Additional evidence suggests PEX should not be used in contaminated soils or where it can be exposed to poisons used for termites or other pests. (3JA 706-712.) The trial court's failure to remand the case has deprived Appellants of the opportunity to set appropriate limits on the use of PEX.

Appellants, rather than the court, have the responsibility and discretion to determine the significance of this new evidence. The trial court's order deprived them of their ability to exercise this discretion on behalf of the People of the State of California.

CONCLUSION

Appellants' decision to defer approval of PEX pending further review and an initial study was proper and is supported by the rulemaking file. The public comments were sufficient for the Commission to order an initial environmental study.

Even if it is assumed the record did not support Appellants' decision or that there were procedural irregularities, the trial court committed reversible error when it impermissibly infringed on Appellants' exercise of their quasi-legislative powers.

Dated: January 14, 2004

Respectfully submitted,

BILL LOCKYER

Attorney General of the State of
California

ANDREA LYNN HOCH

Chief Assistant Attorney General

LOUIS R. MAURO

Senior Assistant Attorney General

CHRISTINE SPROUL

Deputy Attorney General

GARY TAVETIAN

Deputy Attorney General

RAMON M. DE LA GUARDIA

Deputy Attorney General

Attorneys for Defendants and
Appellants

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